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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

GEORGE H. KENNY,
Assistant Counsel to Public Service Commission.
SHERMAN C. WARD,
Acting Counsel to Public Service Commission.

JOSEPH J. DORAN,
SAMUEL R. MADISON,
Of Counsel.

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STATUTES CITED

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Public Service Law of New York:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT AND SPENCER B. EDDY, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

May it please the Court:

Now come the appellees in the above entitled cause by their counsel of record and submit their statement in opposition to jurisdiction and move that the appeal herein be dismissed or that the order and judgment appealed from be affirmed.

Statement

This is an appeal from an order and judgment entered January 23, 1950, in the Supreme Court of the State of New York, upon the amended remittitur of the Court of Appeals of the State of New York, which confirmed a determination and order of the Public Service Commission of the State of New York, adopted on December 30, 1948, prescribing temporary rates to be charged by the appellant for electric service pending the fixing of final rates. The proceeding is in the nature of certiorari under Article 78 of the New York Civil Practice Act.

The prescribed temporary rates became effective on January 10, 1949, and are in effect at the present time. The final rates have not yet been prescribed.

The temporary rates were prescribed pursuant to Section 114 of the Public Service Law, which authorizes the Commission in any pending rate proceeding to fix temporary rates which shall be sufficient to provide a return of not less than five per cent upon the original cost, less accrued depreciation, of the physical property used and useful in the public service. Section 114 provides, in part, as follows:

> "Temporary rates so fixed, determined and prescribed under this section shall be effective until the rates to be charged, received and collected by said utility company shall finally have been fixed, determined and prescribed. The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Under the decisions of the Court of Appeals, this paragraph of the statute, commonly referred to as the "recoup-

ment provision," operates to protect the utility company from any loss which may be sustained by reason of the fact that temporary rates may have been fixed at too low a level. The temporary rates prescribed under Section 114 are not final for the period of their duration. When the Commission fixes the final rates, it is required to examine the experience of the utility company under the temporary rates and to fix the final rates at a level which will reimburse the company for any deficiency below a fair return for the temporary rate period.

Matter of Bronx Gas & Electric Co. v. *Maltbie,* 271 N. Y. 364;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196;

cf. *Staten Island Edison Corp.* v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611.

Upon the institution of this review proceeding, the appellant moved in the New York Supreme Court for a stay of enforcement of the temporary rate order pending the review. Under Section 23 (2) of the Public Service Law such a stay could not be granted except upon a finding by the court, supported by evidence, that great and irreparable damage would otherwise result to the applicant. The Special Term denied the application (193 Misc. 1015) but the Appellate Division, Third Department, granted a stay (275 App. Div. 731). However, the Court of Appeals reversed and denied the application for a stay upon the ground that the appellant herein was amply protected against great and irreparable damage by the recoupment provision of Section 114, and that there had been no showing that the recoupment provision would not afford full protection to the appellant under the circumstances of this case (299 N. Y.

172). The present appellant did not attempt to appeal to this Court from the order entered upon that decision.

In fixing the temporary rate base the Commission utilized the latest available figures shown by appellant's books (as of September 30, 1948) with the sole exception of the reserve for depreciation. It appeared from the testimony of the Company's own witnesses that the amount of accrued depreciation existing in appellant's properties exceeded the amount of its book reserve for depreciation, as shown in its reports to the Commission, by at least $40,000,000. A highly qualified consulting engineer in the employ of the Commission, Mr. Goldthwaite, testified to an amount of accrued depreciation which exceeded the book reserve by $95,500,000.

Section 114 of the Public Service Law, with reference to the fixing of the temporary rates, provides in part as follows:

> "• • • if the duly verified reports of said utility company to the commission do not show the original cost, less accrued depreciation, of said property, the commission may estimate said cost less depreciation and fix, determine and prescribe rates as hereinbefore provided."

Acting under this provision, the Commission deducted from the original cost of the properties an amount of "accrued depreciation" which was estimated in accordance with the testimony of Mr. Goldthwaite, arriving at a rate base of $558,000,000. Utilizing the appellant's book figures for revenues and expenses in the base year ended September 30, 1948, with an estimated increase of $4,040,000 in taxes, and including the full amount of the appellant's book charge for annual depreciation, the Commission estimated that the prescribed rates would provide an annual return of $30,261,410, which is equal to a return upon the tempo-

rary rate base, as determined by the Commission, of 5.42 per cent.

Upon the merits of this review proceeding, the principal contention of the appellant before the courts of New York, was that the statute (§ 114) did not authorize the Commission to adopt an estimate of the accrued depreciation of the physical properties, and that under the circumstances of the case the Commission was required to utilize the appellant's book reserve for depreciation in arriving at the temporary rate base. The Appellate Division, by a four to one decision, held that the Commission did not possess the statutory power to make such an estimate (275 App. Div. 475). The Court of Appeals reversed and held that the Commission possessed such authority under the statute (300 N. Y. 196). In addition the Court of Appeals held that the Commission's determination was amply supported by the record and that no error had been committed in the making thereof. The Court of Appeals said, in part:

> "In a case such as the present, where a witness for the commission has testified that the figure for accrued depreciation is $95,000,000 more than the reserve accumulated by the company on its books, and a witness for the company itself has indicated that the actual depreciation exceeded the book reserve by some $40,000,000, the commission need not blind itself to the fact that the reserve so accumulated upon the company's books does not—as reasonable men would use the word—'show' the accrued depreciation. The commission was authorized, therefore, to make an estimate of that item. In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination."

The Court of Appeals also pointed out that the construction which it placed upon the statute, authorizing the use of an estimate of accrued depreciation in place of the concededly inaccurate book reserve for depreciation, was more in accord with the legislative intent and was "more reasonable and fair, than alternative interpretations." The Court noted that the statutory objectives of "expedition and promptness" would be readily achieved and that when the book reserve for depreciation is "known to be misleading," the "substitution of a more accurate figure" would enhance the value of the experience under the temporary rates for use in fixing final rates (300 N. Y. at p. 207). The Court specifically noted that under the recoupment provision the utility companies would be fully protected if the temporary rates proved to be too low.

> "And, finally, if a temporary rate order is made within the framework of section 114—as it here was—the recoupment provisions of that section apply to prevent any injustice or prejudice to the company even if the temporary rate fixed is later found to have been placed at too low an amount. (See *Matter of Consolidated Edison Co.* v. *Maltbie, supra,* 299 N. Y. 172; *Matter of Bronx Gas & Elec. Co.* v. *Maltbie, supra,* 271 N. Y. 364.)" (300 N. Y. at p. 207.)

Neither the Appellate Division nor the Court of Appeals, in their respective opinions, referred to any constitutional issue sought to be raised by the appellant here. Any constitutional issue properly raised was, of course, subject to decision by the New York courts in this proceeding, as well as any other question of law, including the question of whether there was evidence to sustain the findings of the Commission (*New York ex rel. Consolidated Water Co.* v. *Maltbie,* 303 U. S. 158, and cases there cited.) Apparently the courts of New York did not believe that any substantial constitutional question had been raised. Use of the cus-

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tomary language in the amended remittitur to indicate that the Court of Appeals "necessarily" passed upon constitutional questions is significantly absent. As appears from the petition for appeal herein, the Chief Judge of the Court of Appeals, on April 11, 1950, denied appellant's petition for an order allowing an appeal, and the present appeal is taken under the order of Mr. Justice Jackson dated April 12, 1950.

ARGUMENT

I. This Court Should Refuse to Entertain Jurisdiction Herein for the Reason That No Substantial Federal Question Is Involved.

1. *The Commission acted fairly and reasonably within the framework of the statute and its determination was not in any respect arbitrary or illegal.*

The Commission in this case adhered meticulously to the statutory standards contained in Section 114 of the Public Service Law. In constructing the rate base, the Commission adopted the appellant's own book figures for original cost. Since all of the testimony, including that of appellant's witnesses, showed that the book reserve for depreciation did not show the accrued depreciation of the property, the Commission determined to adopt an "estimate" thereof for temporary rate purposes, as specifically authorized by Section 114.

The appellant's own witnesses had testified to amounts of accrued depreciation which exceeded the reserve account by about $40,000,000. The Commission's engineer testified that the accrued depreciation exceeded the reserve account by about $95,000,000. The depreciation testimony was highly complex and very voluminous, occupying about 15 per cent of the long record. A complete analysis of the extensive testimony and exhibits relating to depreciation,

and the making of a final and conclusive determination of the accrued depreciation of the properties would have consumed a prohibitive period of time. If the temporary rates were required to be fixed on the basis of such an analysis and determination, the temporary rate order could not have been made. Accordingly, the Commission adopted, solely as an "estimate" for temporary rate purposes, the amount of accrued depreciation (about $255,000,000) testified to by its engineer, Mr. Goldthwaite. This is not to say that the Commission disregarded the testimony of the appellant's witnesses or that it acted unfairly or arbitrarily. The determination did not relate to final rates. In view of the recoupment provision of Section 114, the determination was not final in its effect. The Commission in the exercise of its administrative discretion determined that for temporary rate purposes the testimony of Mr. Goldthwaite represented a reasonably accurate figure upon which to base an estimate of the accrued depreciation. As stated by the Court of Appeals:

> "In the light of the evidence adduced, it may not be said that its figure of $255,000,000 was without support. While other and variant figures were in the record, the courts will not and cannot assume that the commission failed to consider them in reaching its estimate, which concededly was not a final determination." (300 N. Y. at p. 207.)

Having thus arrived at the temporary rate base of $558,000,000, the Commission utilized the appellant's actual book figures for revenues and expenses to arrive at a return of not less than 5 per cent upon such rate base, as provided by Section 114. The appellant's claim that the Commission, for this purpose, reduced appellant's annual charge for depreciation expense is wholly illusory. In projecting the prospective annual revenues and expenses for the temporary rate period, the Commission adopted appellant's

own book figures for the base year ended September 30, 1948, adjusted only for estimated taxes, the estimate exceeding the actual taxes for the base period by $4,040,000.

The temporary 10 per cent reduction of rates in the specified rate classifications was computed by the Commission to result in a reduction in revenues of $21,500,000. Due to the concomitant savings in gross revenue taxes and income taxes, the reduction of operating income, after taxes, would be $12,427,000, leaving a net operating income, after taxes, and after the rate reduction, in the amount of $30,261,410. This was the amount to be available for return.

The effect of the temporary rate reduction, with reference to the figures taken directly from the appellant's books for the base year, is shown in the Company's petition in this proceeding by a tabulation, summarized as follows:

Electric Department, Operating Income, before Income Taxes	$62,688,410
Less Federal Income Taxes (as estimated by the Commission)	20,000,000
Electric Department Net Operating Income	$42,688,410
Reduction of Operating Income resulting from Rate Reduction of $21,500,000, after gross Revenue Taxes and Income Taxes at 42.2 per cent	12,427,000
Electric Department Net Operating Income after Rate Reduction	$30,261,410

The estimated return of $30,261,410, which is stated by the appellant itself to be its actual return, adjusted for the temporary rate reduction, during the base year (Appellant's typewritten statement as to jurisdiction, par. IV, p. 13), would provide a return of 5.42 per cent upon the Commission's rate base. As said by the Appellate Division of the New York Supreme Court in this case: "Computed on a net physical property valuation of $558,000,000, as fixed

by the commission, the temporary rates, based on the amount of electric service sold during the base year ending September 30, 1948, would produce a return of more than the 5% provided by statute * * *." (275 App. Div. at p. 478.)

The statute (§ 114) does not require the Commission to make a final and conclusive determination of the fair rate of return to which the appellant would be entitled under final rates. The statute provides only that the return must not be less than 5 per cent upon the original cost less accrued depreciation of the physical property. This requirement was complied with in this case. Even when the entire amount of the appellant's construction work in progress ($38,000,000) is added to the Commission's rate base, the return would be 5.07 per cent.

All of appellant's claims of arbitrary and improper action by the Commission have been fully presented to the courts of the State of New York and upon full consideration have been held to be without substance. The majority of the Appellate Division held, solely as a matter of statutory construction, that the Commission was required to accept the appellant's book reserve for depreciation. The Court of Appeals reversed, holding that the statute authorized the Commission to adopt an estimate of accrued depreciation. Not a single Justice of the Appellate Division, and not a single Judge of the Court of Appeals, has held or even intimated that, under the proper construction of the statute, the Commission has acted unfairly, unreasonably, arbitrarily or in anywise improperly.

The present case falls squarely within the statement made by this Court in dismissing the appeal in *New York ex rel. Consolidated Water Co.* v. *Maltbie*, 303 U. S. 158, 160:

> "2. Upon the review of the Commission's orders by certiorari, only questions of law were open under the state practice, including the question whether there

was evidence to sustain the findings of the Commission. 275 N. Y. at p. 366; 9 N. E. 2d 961. In that view no substantial federal question is presented. *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668-670; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 92; *New York ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 88-90, 245 U. S. 345, 348, 349. The motion to dismiss is granted."

2. *The temporary rate statute, as construed by the Court of Appeals and as applied by the Commission, does not violate any of appellant's constitutional rights.*

It will be observed at once that the appellant does not contend that the general scheme of Section 114 of the Public Service Law, by which temporary rates are prescribed on the basis of at least a 5 per cent return upon original cost less accrued depreciation, without consideration of all of the factors entering into the fixing of permanent rates, but with recoupment to the appellant for any deficiency below a fair return during the temporary rate period, is *per se* unconstitutional. No such claim was made before the courts of New York in this proceeding and accordingly such a claim, if now presented, would not support the jurisdiction of this Court (cf. *Memphis Natural Gas Co.* v. *Bieler*, 315 U. S. 649). But, as stated, appellant does not even now advance this claim. And if it did, the claim would be wholly without substance for all of the reasons stated by the Court of Appeals when such a contention was directly advanced to that Court by a predecessor in interest of the present appellant.

Matter of Bronx Gas and Electric Co. v. *Maltbie*, 271 N. Y. 364.

The contention of the appellant upon this appeal, as set forth in the first six assignments of error, is that the statute (§ 114), as applied by the Commission in this case,

operates to deprive the appellant of its property without due process of law because the Commission did not make a final and conclusive determination as to the accrued depreciation of the property (Assignment No. 1); as to the proper annual depreciation charge (Assignment No. 2), and as to the fair rate of return to which the appellant would be entitled in the fixing of final rates (Assignment No. 3). The result, it is claimed, is that appellant has been denied "procedural due process of law" (Assignments Nos. 1, 2 and 3); that the statute constitutes a grant to the Commission of "unlimited discretion and a delegation of arbitrary power to fix rates, in violation of constitutional guarantees" (Assignment No. 5); that the Commission's order "would result in the confiscation of appellant's property" (Assignment No. 4); and, finally, that the recoupment provision of Section 114, under such circumstances, is "not a sufficiently adequate, certain or convenient protection to the appellant," so that the statute operates to deprive the appellant of its property without due process of law (Assignment No. 6).

There has been no factual showing whatever, at any stage of this case, that the recoupment provision of Section 114 will not operate to fully protect the appellant from any loss which might occur if the temporary rates had been fixed at too low a level. This was the unanimous decision of the Court of Appeals when it denied the appellant's motion for a stay pending review in this case. Referring to the rationale of the decision of the Appellate Division granting a stay (275 App. Div. 731), the Court of Appeals said:

> "The answer to these misgivings is to be found, we think, in the construction which this court put upon section 114 in *Matter of Bronx Gas & Elec. Co.* v. *Maltbie* (271 N. Y. 364, 375). Section 114, we there said, 'forces the Public Service Commission to consider the returns from the temporary rate and to establish the permanent rate, or the final rate, accordingly; that is, if the temporary rate has proved to be

too low the final rate must make it up to the company. Over what time it is necessary to provide a rate sufficient to make up the loss, or to include the take-up, is a matter of adjustment, machinery and method. These matters are all in the hands of the Public Service Commission, which may increase or modify a rate to meet the circumstances at any time.'

The recoupment proviso of section 114 is applicable to the temporary rates here in question. Hence, 'great and irreparable damage' cannot result to the company from the temporary rate order, notwithstanding the Commission made its own estimate of the depreciation of the used and useful physical property of the company instead of accepting the figures shown on the company's records. Hence, too, the magnitude of the sums that the company may be entitled to recapture does not demonstrate either the existence of 'great and irreparable damage' or the inadequacy of the recoupment proviso of section 114 (see *Staten Is. Edison Corp.* v. *Maltbie*, 292 N. Y. 611)." (*Matter of Consolidated Edison Co.* v. *Maltbie*, 299 N. Y. 172, 176.)

The recoupment provision, of course, does not authorize the Commission to take arbitrary, improper or illegal action in the fixing of temporary rates upon the theory that ultimately any resulting detriment to the utility companies will be corrected in the fixing of final rates. But the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved. Under the New York system of ratemaking, integrated within the provisions for judicial review, such constitutional standards are applicable only when the final rates are fixed. Meanwhile the statutory provision for recoupment, coupled with the right of the company to apply for a stay of enforcement of the temporary rates

upon a showing that great and irreparable damage would otherwise result, affords ample protection against any deprivation of constitutional rights.

In the case of *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 722, the three-judge statutory Court examined similar contentions with reference to alleged "violation of the procedural protection afforded by the due process clause" in respect to the fixation of temporary rates under the similar provisions of the temporary rate statute of Pennsylvania. The Court rejected the arguments, saying in part (p. 726):

> "The Water Company further contends that the interim order was made by the Commission in violation of the procedural protection afforded by the due process clause. It alleges that it was prevented from presenting pertinent testimony to the examiner when the Commission cancelled the January 27th hearing and that the interim order was made without giving it an opportunity to present its case upon written briefs and oral argument. It must be remembered that the protection offered by the due process clause is against the deprivation or confiscation of property. As we have shown the temporary rates prescribed by the Commission do not affect finally or permanently the rights of the Water Company in such fashion as to deprive that company of its property. We, of course, do not hold that temporary rates may be fixed by the Commission capriciously or arbitrarily and without regard "to the minimum standard laid down in the statute. * * * In fixing a rate which is truly temporary in its effect we think that the Commission need have before it merely sufficient evidence to furnish prima facie support for its findings. An analogy may be found in the right of a court of equity to issue an interlocutory injunction ex parte, such as was issued in this case. The procedural safeguards afforded by the due process clause will be fully available to the Water Company in the proceedings to determine the final rates" (p. 726).

The Court of Appeals of the State of New York has directly held on at least four occasions that the Commission, when it fixes final rates, must permit the Company to recoup the difference, if any, between just and reasonable rates and the temporary rates, for the period while the temporary rates have been in effect.

Matter of Bronx Gas and Electric Co. v. *Maltbie,* 271 N. Y. 364;

Staten Island Edison Corp. v. *Maltbie,* 292 N. Y. 611, aff'g 267 App. Div. 72;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172;

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196.

In the first *Staten Island Edison Corporation* case, *supra,* the Court of Appeals affirmed, without opinion, a decision of the Appellate Division that in view of the recoupment provision of Section 114, no case of confiscation was properly presented with respect to a temporary rate order of the Commission and that this constitutional issue could not properly be presented except upon review of the final rate order of the Commission.

Staten Island Edison Co. v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611;

cf. *Staten Island Edison Co.* v. *Maltbie,* 296 N. Y. 374.

The contentions of the appellant that the statute (§ 114), and the operation thereof in this case, deprive the appellant of its property without due process of law and are violative of appellant's constitutional rights are wholly without substance.

3. *The contention that the laws of New York do not afford effective judicial review, is without substance.*

The seventh assignment of error is to the effect that, "as presently construed, the laws of New York do not afford effective judicial review by the Courts of that State of temporary rates prescribed by the Commission under Section 114," and, therefore, that the section is unconstitutional. It follows from what has already been said, that this contention is wholly without merit.

The temporary rate orders of the Commission, made under Section 114 of the Public Service Law, are reviewable by a proceeding such as the present one, in the nature of certiorari, under Article 78 of the Civil Practice Act.

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 300 N. Y. 196;

cf. Staten Island Edison Corp v. *Maltbie,* 267 App. Div. 72, aff'd. 292 N. Y. 611.

The procedure under Article 78 affords a full review of all question of law, including the question of whether there was evidence to sustain the findings of the Commission.

N. Y. ex rel. Consolidated Water Co. v. *Maltbie,* 303 U. S. 158.

Under Article 78 of the Civil Practice Act, a stay may be granted of the enforcement of a temporary rate order made under Section 114 of the Public Service Law, upon a proper factual showing that the recoupment provision of that section will not protect the utility company against great and irreparable damage.

Civ. Prac. Act, § 1299;

Pub. Ser. Law, § 23 (2);

cf. Matter of Consolidated Edison Co. of N. Y. v. *Maltbie,* 299 N. Y. 172.

Upon the fixing of final rates, the Commission is required to grant recoupment for any deficiency below a fair return

under just and reasonable rates, suffered by the utility company during the temporary rate period (see cases cited supra). And in respect to such a final rate order the utility company is not only entitled to the limited review provided by Article 78 of the Civil Practice Act, but under the law of the State of New York is entitled to maintain an action in equity to enjoin enforcement of the final rates, in which action the Court may exercise its independent judgment upon the facts as well as the law.

Staten Island Edison Co. v. *Maltbie*, 296 N. Y. 374.

In an action or proceeding to enjoin or review a final rate order, the utility company, upon a proper showing that substantial Federal questions are involved, may appeal to this Court and obtain full protection of its constitutional rights.

cf. N. Y. ex rel. Consolidated Water Co. v. *Maltbie*, 303 U. S. 158.

We respectfully submit that, for the reasons stated, no substantial Federal question has been shown to exist in this case and, accordingly, that the appeal should be dismissed or the order and judgment appealed from should be affirmed.

II. The Order and Judgment Confirming the Temporary Rate Order Are Not Final for the Purpose of an Appeal to This Court.

Since, under the New York practice, the appellant will be fully indemnified in the fixing of the final rates, against any loss suffered under the temporary rates, with full right of judicial review of the final rate order, including an appeal to this Court, it is apparent that the present attempt to raise issues under the Federal Constitution is wholly premature. The order and judgment appealed from are not final for the purpose of an appeal to this Court and, accord-

ingly, the appeal should be dismissed for that additional reason.

Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62.

III. In Any Event, the Federal Questions Sought to Be Raised Herein Are Res Judicata and Will Not Sustain the Jurisdiction of the Court.

If there were any merit to the contention of the appellant that the recoupment provision of Section 114 of the Public Service Law, as construed by the Court of Appeals, is not adequate to protect the appellant in all of its constitutional rights, and if the Commission were incorrect in asserting that the temporary rate order is not sufficiently final in its effect to warrant this Court in entertaining jurisdiction of this appeal, then it seems clear that the appeal comes too late, and that the contentions of the appellant are *res judicata* under the earlier decision of the Court of Appeals denying the appellant's motion for a stay pending the review.

Matter of Consolidated Edison Co. of N. Y. v. *Maltbie*, 299 N. Y. 172.

The denial of a stay upon the ground that the recoupment provision protected appellant against great and irreparable damage was a complete rejection of the appellant's claim of a deprival of property without due process of law. Under appellant's contentions, which were advanced to the Court of Appeals upon the previous appeal, the recoupment provision does not protect it. If the appellant were correct in that contention, its constitutional rights were violated—its property irrevocably taken—when the Court of Appeals refused to stay the Commission's rate order by its decision of April 20, 1949. In that view the appellant could have taken an appeal to this Court from that decision. As this Court has recently said:

> "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68; see also cases there cited.)

The failure of the appellant to take an appeal to this Court from a prior order of the Court of Appeals, having the effect of finally adjudicating the issue of a deprival of property without due process of law, would render the prior order *res judicata* and preclude further litigation of that issue.

Cf. New York State Electric & Gas Corp. v. *Public Service Commission*, 102 F. 2d 453.

Conclusion

The appeal herein should be dismissed or in the alternative the order and judgment appealed from should be affirmed.

Dated April 28, 1950.

Respectfully submitted,

GEORGE H. KENNY,
Assistant Counsel to Public Service Commission;
SHERMAN C. WARD,
Acting Counsel to Public Service Commission,
Attorneys for Appellees.
Office and Postoffice Address
The Governor Alfred E. Smith State Office Bldg.,
Albany 1, N. Y.

JOSEPH J. DORAN,
Assistant Counsel;
SAMUEL R. MADISON,
Principal Attorney,
Of Counsel.

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